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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 856

WILLIAM H. JEFFERSON,

Petitioner,

v.

TAIYO KAIUN K.K., ET AL.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	Page
Questions Presented	1
Statement of the Case	1
Reasons why the Petition should not be granted	2
Conclusion	7

TABLE OF AUTHORITIES

Cases

Alaska Steamship Company v. Petterson, 347 U.S. 396	3
Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, 358-359	3
Comstock v. Group of Institutional Investores, 335 U.S. 211, 214	4
Corn Products Ref. Co. v. CIR, 350 U.S. 46, 51	4
General Pictures Co. v. Electric Co., 304 U.S. 175, 178	4
Mahnich v. Southern Steamship Company, 321 U.S. 96	3
Maynard v. Durham, & S.R. Co., 365 U.S. 160	4
Michalic v. Cleveland Tankers, Inc., 364 U.S. 325	4
NLRB v. Waterman SS Co., 309 U.S. 206, 208	4
Rogers v. Missouri Pac. R. Co., 352 U.S. 500	4
Ryan Stevedore Co., Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 135, 140	5
Screws v. United States, 325 U.S. 91, 112	3
United States v. Dickinson, 331 U.S. 745, 751	4
United States v. Johnston, 268 U.S. 220, 227	4

Constitution

Seventh Amendment	2, 5

Miscellaneous

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland Ed, 1951) §333	4

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QUESTIONS PRESENTED

1. Will the protection of the Seventh Amendment be denied to respondent?

2. Will the Supreme Court redetermine facts found by a jury?

3. Will the Supreme Court redetermine facts found by a jury and concurred in by the District Court and the Court of Appeals?

STATEMENT OF THE CASE

The petitioner, a longshoreman by profession, was injured on board respondent vessel. After recovering compensation under the federal Longshoremen's and Harbor-

workers' Compensation Act, the petitioner instituted suit against the vessel alleging various acts of negligence and unseaworthiness. However, during the trial the petitioner expressly waived and abandoned any contention of negligence and any contention with regard to the vessel's duty to furnish a safe place to work (Tr. 213, 356-357). The petitioner also insisted that consideration of the issue of seaworthiness be limited to one particular piece of dunnage board (Tr. 244-245, 248)[1].

The petitioner had elected trial by jury (Tr. 366). The jury, under a charge fashioned at the instance of the petitioner, (Tr. 248) found that there was no unseaworthiness (Tr. 345). The District Court entered judgment for respondent, holding that the issue was properly submitted to the jury (Tr. 355-357). The Court of Appeals affirmed, holding that the disputed facts were properly left to the jury to resolve (Petition, page 3a-5a). The petitioner nevertheless seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Trial by jury was selected by the petitioner. The jury, under a charge by the court unchallenged as to the law (and, in fact, demanded by the petitioner) found for the respondent on the only theory of liability presented.

The District Court entered judgment for respondent on the jury's verdict.

The Court of Appeals for the Fifth Circuit, after reviewing the evidence, affirmed the judgment for respondent, honoring the jury's verdict as required by the Seventh Amendment. Specifically, the Court of Appeals relied upon

[1] The court will note that the petitioner has changed his theory in his petition. He now wants the whole "floor" considered (Petition, page 2), even though he admits that the testimony with regard to the "floor" was in conflict (Petition, page 2).

Atlantic & Gulf Stevedores v. *Ellerman Lines*, 369 U.S. 355, 358-359, which held that neither the Supreme Court "nor the Court of Appeals can redetermine facts found by the jury. . . ." Furthermore, the Court of Appeals had no difficulty in reconciling the answers to the special interrogatories made by the jury.

However, without even citing the *Ellerman Lines* case or really discussing the basis of the Court of Appeals decision, the petitioner seeks certiorari on the theory that the Supreme Court should disregard the jury's verdict and find facts as a matter of law. For this novel proposition he cites two cases, neither of which has any application.

In *Mahnich* v. *Southern Steamship Company*, 321 U.S. 96, a federal judge, sitting in admiralty, found as a fact that a defective rope had been provided to a seaman, but nevertheless entered judgment for the ship. The basis for decision, approved by the Court of Appeals, was dictum in an early Supreme Court case to the effect that a ship was not unseaworthy when some appliances were seaworthy. Certiorari was granted. The Court specifically noted that "a finding of seaworthiness is usually a finding of fact" and not reviewable in the Supreme Court, but, since the courts below had made a conclusion of law, review was proper. 321 U.S. at 98, 99. The court went on to overrule the dictum in the earlier case — which was recognized to be an anomaly. *Screws* v. *United States*, 325 U.S. 91, 112.

It is vital to note that in *Mahnich* the Supreme Court did not do what the petitioner claims. The Court did not make any *de novo* finding of fact. The judgment of the courts below was reversed on the basis of the fact found by the District Judge — that the rope was defective.

Similarly, the *Alaska Steamship Company* v. *Petterson*, 347 U.S. 396, was a *per curiam* decision based on an appeal

in admiralty. The Supreme Court did not make any findings of fact. All the Court did was to uphold the legal standard involved below.

The instant case is clearly not within the purview of the above decisions. First, the trier of fact found the dunnage board in question not to be defective. Second, neither court below made a conclusion of law, other than the well established doctrine that disputed issues of fact are to be resolved by the jury. Third, the instant case was a trial by jury on the civil side of the Federal Court's docket, not on the admiralty side.

While the granting of certiorari is, of course, discretionary, past decisions have indicated that the Court ordinarily refuses to review evidence and to discuss specific findings of fact. E.g., *United States v. Johnston*, 268 U.S. 220, 227; *General Pictures Co. v. Electric Co.*, 304 U.S. 175, 178; *NLRB v. Waterman SS Co.*, 309 U.S. 206, 208. A corollary is the "two court" doctrine, which militates strongly against reviewing evidence when findings of fact have been concurred in by the two courts below. E.g., *Corn Products Ref. Co. v. CIR*, 350 U.S. 46, 51; *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214; *United States v. Dickinson*, 331 U.S. 745, 751. Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson and Kurland Ed. 1951) § 333. In fact, when the Supreme Court does review evidence, it is in the situation where the lower court has taken the case away from the jury for judicial determination. See, e.g., *Maynard v. Durham, & S.R. Co.*, 365 U.S. 160; *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325; *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500. The effect of the Court's opinions in those cases was to vindicate — not to derogate from — the jury's verdict.

Petitioner's case presents the exact opposite situation. All he wants is an appellate fact finding, inconsistent with

the jury's, that this particular piece of lumber was unseaworthy.[2] To achieve that result, petitoner would have this Court undermine the many decisions, cited above, required to uphold the integrity of the jury's verdict against judges' efforts to substitute their view of the way the jury should have found the facts. Even the portions of the record selected by the petitioner for comment demonstrate a conflict in the testimony which could only be resolved by the jury.[3]

Thus, even if the Supreme Court should decide to review the evidence in this specific case and to review the findings of fact concurred in by a jury, a district judge, and three appellate judges, the Court would be bound by the Seventh Amendment to uphold the findings of the jury. As stated in *Atlantic and Gulf Stevedores* v. *Ellerman Lines*, *supra*,

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search of one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." 369 U.S. at 364.

Petitioner's appeal to the appellate courts to save him from an adverse verdict after trial by jury (a risk so carefully explained to the longshoreman by Mr. Justice Black,

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[2] Apparently the petitioner considers the jury's verdict as being conclusive on whether the board actually broke. However, if the evidence is to be reviewed on the jury's verdict that the board was seaworthy, it is only fair that the evidence be reviewed on the issues answered favorably to the petitioner.

[3] Respondent will not burden the Court with a lengthy discussion of the evidence or with speculation as to which theory persuaded the jury. At this stage, the fact that the evidence satisfied the jury, the trial judge, and the appellate court should be conclusive. But, for example, the jury may have believed that no dunnage board was ever intended to support the weight of a man and a bale of cotton and that petitioner should have done his "cutting" on a barrelhead (See Petition, p. 4).

joined by the Chief Justice and Justices Douglas and Clark in *Ryan Stevedore Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 135, 140) should be futile. The protection incident to the institution of trial by jury, as guaranteed by the Seventh Amendment, is afforded equally to the parties in a law suit, plaintiff or defendant. The respondent has been vindicated by a jury whose verdict has been sustained by a District Court and a Court of Appeals. The matter should now be at an end.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should not be granted.

Respectfully submitted

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William C. Harvin

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Frank G. Harmon

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of March, 1963, a true and correct copy of this Brief in Opposition was served on Messrs. Mandell & Wright, 707 South Coast Building, Houston 2, Texas, by placing same in the United States mails, properly addressed, postage prepaid, certified mail.

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